Supreme Court, U.S.
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No. 98-447

In the Supreme Court of the United States

OCTOBER TERM, 1998

VITEK SUPPLY CORPORATION AND
JANNES DOPPENBERG, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court's instructions adequately advised the jury of the elements of petitioners' offenses.

2. Whether the district court had discretion to reject petitioners' untimely lesser-included-offense instruction.

3. Whether the district court's finding that petitioners' customer had been defrauded, and had therefore suffered a loss cognizable under United States Sentencing Guidelines § 2F1.1, was clearly erroneous.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 144 F.3d 476.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1998. A petition for rehearing was denied on June 16, 1998 (Pet. App. B). The petition for a writ of certiorari was filed on September 14, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioners were convicted on one count of conspiring to defraud the United States by impeding the lawful functions of the United States

Food and Drug Administration and the United States Customs Service, in violation of 18 U.S.C. 371; five counts of smuggling goods into the United States, in violation of 18 U.S.C. 545; and six counts of introducing adulterated and misbranded drugs into interstate commerce, in violation of 21 U.S.C. 331(a), 333(a)(2), and 352(a). Petitioner Doppenberg was sentenced to 44 months' imprisonment, to be followed by three years' supervised release, and was fined $25,000. Pet. App. A17-A18; see also C.A. App. 2-4.[1] Petitioner Vitek Supply Corporation was placed on four years' probation and was fined $350,000. Pet. App. A18; C.A. App. 8-9. Petitioners were held jointly liable for restitution of $735,266.65. Pet. App. 18; see C.A. App. 6, 11. The court of appeals affirmed. Pet. App. A1-A26.

1. Section 331(a) prohibits "[t]he introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded." 21 U.S.C. 331(a). Under Section 333(a)(2), a person who violates Section 331 "with the intent to defraud or mislead" is subject to criminal penalties. 21 U.S.C. 333(a)(2).

Petitioner Vitek Supply Corporation, of which petitioner Doppenberg was the general manager, manufactured feed mixtures for veal calves using certain substances that were unapproved by the Food and Drug Administration. Pet. App. A1; Gov't C.A. Br. 6. Several of those substances are carcinogenic or otherwise harmful to human health. Pet. App. A1. With the assistance of Vitek's Dutch parent corporation, petitioners

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[1] "C.A. App." refers to the appendix materials filed in the court of appeals, some of which were appended to petitioners' opening brief, and some of which were filed in a "Separate Appendix of Defendants-Appellants."

smuggled the substances into the United States, often through fraudulent means. *Id.* at A2. The evidence of fraud included the use of code names and numbers in inventory records, mixing formulas, invoices, and other records; misrepresenting to U.S. Customs the contents of goods imported into the United States; concealing goods on pallets underneath other goods; double-bagging products to conceal the labeling; and identifying on product labels all contents except the illegal drugs. Gov't C.A. Br. 43-44.

2. At trial, the district court charged the jury that, with respect to the scienter component of Section 333(a)(2),

> [t]o act with intent to defraud means to act voluntarily and intentionally to deceive or cheat. The intent to defraud may be established by proof that, with respect to the specific count in question, the defendant intended to deceive or cheat another person, a business entity, or a government agency. To act with intent to defraud a government agency means to act with the intent to interfere with or obstruct a lawful government function by deceit or trickery, or at least by means that are dishonest.
>
> . . .
>
> To act with the intent to mislead means to act voluntarily and intentionally to conceal a material fact and thereby create a false impression, or to omit or withhold information from a statement and thereby cause a portion of the statement to be misleading. An intent to mislead may be established by proof that the defendant intended to mislead a person, an entity with whom he was doing business, or a government agency.

Pet. App. A15-A16. The court rejected other instructions submitted by petitioners, which would have described the scienter element in more detail—by specifying, for example, that the government had to prove that petitioners "knew that the substances in question were new animal drugs" and that petitioners had "actual knowledge that the drug[s] at issue w[ere] unapproved and not properly labeled or safe." Gov't C.A. Br. 45-46; see generally C.A. App. 126-134.

At the very close of the charging conference, petitioner Doppenberg's attorney orally announced, without elaboration, that "on behalf of Mr. Doppenberg we want lesser included offenses to be submitted to the jury." Tr. 3835. The district court rejected the request on the ground that "[i]f you wanted that you should have brought it up before." *Ibid.* Petitioners subsequently put into writing their proposal for a lesser-included-offense instruction on the Section 333(a)(2) counts, but only after the government had begun its closing argument. See Gov't C.A. Br. 41-42; Pet. App. A15 n.2; see also C.A. App. 121-123. The district court again rejected the proposed instruction, this time on two independent grounds: first, that the request was untimely and, second, that it was insufficiently detailed to enable the court "to determine whether or not [the purported lesser included offenses] are in fact lesser included offenses." C.A. App. 125; see also Pet. App. A15 n.2.

Petitioners were found guilty on all twelve counts of the indictment. C.A. App. 1, 7. In calculating the offense level for the six adulterated and misbranded drug counts, the district court applied the specific offense characteristic in Section 2F1.1(b)(1) of the United States Sentencing Guidelines for losses greater than $2,000. Pet. App. A17-A18. The district court arrived

at a loss figure that fell between the figures suggested by the government and petitioners. The figure adopted by the court was based on the sum of the government's own loss of $29,254 in import duties plus a $705,814 loss incurred by a meat processing company (Swissland Packing Co.), which had to destroy its calves after learning that they had been fed tainted products supplied by petitioners. *Id.* at A18; see C.A. App. 38.[2]

3. The court of appeals affirmed. Pet. App. A1-A26. After addressing a variety of issues that petitioners do not present here (see *id.* at A2-A15), the court turned to petitioners' challenge to the district court's scienter instructions. The court of appeals held that those instructions, "when considered in their larger context, adequately advised the jury" of the requirements of Sections 331(a) and 333(a)(2). *Id.* at A16; see *id.* at A15-A17. The court separately held that petitioners' challenge to the district court's refusal to present a lesser-included-offense instruction "does not warrant discussion," because petitioners' request for that instruction was "untimely," and "the district court had the discretion to reject it." *Id.* at A15 n.2.

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[2] In early December 1998, petitioners agreed to make immediate payment of $400,000 "for the use and benefit of Swissland" as "payment in full of the restitution ordered to be paid to Swissland" in the district court judgment. Settlement Agreement and General Releases at 4; see also Order of Dec. 8, 1998 (approving settlement agreement). The parties entered into that settlement agreement largely because Swissland wished to avoid "additional efforts to locate assets and supplemental litigation to enforce collection." Settlement Agreement at 2. The United States was a party to the agreement "only because the aforesaid restitution is to be paid to the U.S. for the use and benefit of Swissland." *Id.* at 3. Petitioners have not contended, and could not contend, that the settlement agreement is in any respect relevant to the issues presented in this petition.

Finally, as to sentencing, the court of appeals rejected challenges brought by both the government and petitioners to the district court's calculation of the amount of loss under Guidelines § 2F1.1. Pet. App. A17-A26. The court of appeals found, among other things, that the district court had not erred in rejecting petitioners' claim that Swissland had known "the true content" of petitioners' products and therefore (according to petitioners) could not have suffered any cognizable "loss." *Id.* at A20 n.3.

ARGUMENT

1. Petitioners first contend (Pet. 15-21) that the district court erred in rejecting their proposed scienter instructions for the substantive offenses charged under Section 333(a)(2), and that the court of appeals' refusal to reverse their convictions in light of that purported error raises important issues concerning the harmless error doctrine. That claim is without merit, because there was in fact no "error" that could give rise to any harmless error issue.

As the court of appeals determined, the instructions actually given, "when considered in their larger context, adequately advised the jury" of the nature of the required scienter finding. Pet. App. A16-A17.[3] Peti-

[3] Petitioners are therefore simply mistaken in contending (Pet. 17) that the court of appeals "acknowledged that the district court's instructions failed to include * * * necessary elements of the offenses charged." Although the court of appeals noted that the instructions "did not explicitly state that the defendants had to know that they were distributing new animal drugs or misbranded products," it found no error, because, taking the instructions as a whole and in context, "the jury understood that one of the issues was whether [petitioners] *knew* that they were distributing 'new animal drugs' and that their labeling omitted information about the presence of unapproved substances." Pet. App. A17. In any event,

tioners contend (Pet. 19) that the court of appeals erred in considering "the evidence and arguments of counsel" in assessing the jury instructions. This Court has made clear, however, that in determining whether there is "a reasonable likelihood that the jury has applied the challenged instruction[s]" erroneously, a court must consider the "commonsense understanding of the instructions in the light of all that has taken place at the trial." *Boyde* v. *California*, 494 U.S. 370, 380-382 (1990). The court of appeals correctly applied that guidance here. The court found that "[i]n light of the[] closing arguments and the evidence presented at trial," the jury understood the elements of the charged offenses and on that basis found petitioners guilty of committing those offenses. See Pet. App. A17. There was thus no constitutional violation of which petitioners could complain. As a result, unlike the harmless-error cases that petitioners cite (Pet. 18-19), this case does not present any issue concerning the appropriate scope of harmless error review when the trial court's jury instructions deprived the jury of its role in finding each element of a charged offense.

Although petitioners suggest (Pet. 20-21) that this case presents an opportunity for the Court to revisit the issue left unresolved in *Rogers* v. *United States*, 118 S. Ct. 673 (1998), that case in fact illustrates precisely why petitioners' claims here do not warrant review. In *Rogers*, this Court granted certiorari to consider whether a district court's failure to instruct the jury on an element of an offense could be harmless where the

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as the government stressed in the court of appeals, we believe that the district court's instructions, even if viewed in isolation, adequately described the scienter element of the offenses at issue. See Gov't C.A. Br. 45-48.

defendant had admitted the element under oath. The Court dismissed the writ as improvidently granted, however, after determining that the jury may in fact have construed the instructions to require it to find the purportedly omitted element. *Id.* at 676-677 (plurality opinion); *id.* at 677-678 (O'Connor, J., concurring in the result). Here, the court of appeals' correct and fact-bound determination that the jury knew (and found) the elements of petitioners' offenses renders irrelevant, as in *Rogers*, any inquiry into the circumstances in which an instructional error that removes an element from the jury's consideration requires reversal of the defendant's conviction.[4]

2. Petitioners next argue (Pet. 21-24) that the court of appeals should have considered on the merits their claim that they were entitled to a lesser-included-offense instruction on the Section 333(a)(2) counts. The court denied that claim on procedural grounds, reasoning that the district court had acted within its discretion in rejecting that instruction because the defendants did not request it in writing "until after the

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[4] This Court recently granted certiorari in a case presenting a harmless-error issue similar to the one that petitioners mistakenly contend is presented here. See *Neder* v. *United States*, No. 97-1985 (to be argued Feb. 23, 1999). Even if there had been error in this case, however, there would be no reason to hold the petition here pending disposition of *Neder*. This case, unlike *Neder*, would not require a harmless-error analysis based on the strength of the evidence on an uncontested issue. If there had been error in this case, harmless-error analysis would rest on, *inter alia*, the fact that the jury's "guilty verdict on the [separate] charge of conspiracy against the FDA and Customs is a 'clear indication' that the jury believed that Vitek and Doppenberg were aware of the illegal nature of their activities." Pet. App. A17; see, *e.g.*, *Carella* v. *California*, 491 U.S. 263, 270-271 (1989) (Scalia, J., concurring in the judgment).

government began its closing argument." Pet. App. A15 n.2. Petitioners nonetheless contend (Pet. 22) that petitioner Doppenberg's attorney adequately preserved their request for that instruction by announcing, at the end of the charging conference, that "we want lesser included offenses to be submitted to the jury." Tr. 3835. That claim is without merit.

Rule 30 of the Federal Rules of Criminal Procedure provides that parties shall file "written requests" for jury instructions by "the close of evidence." Petitioners violated that requirement. Indeed, the district court noted that the defense had engaged in a "pattern of * * * dilatory tactics," that "there weren't *any* instructions submitted in a timely fashion for the defendants," and that, although the court did accept some belated proposals, it "ha[d] to draw the line somewhere," for "otherwise the court would never be able to proceed to instruct the jury." C.A. App. 124 (emphasis added). In these circumstances, the district court acted well within its discretion in refusing to consider the proposed lesser-included-offense instruction.

Neither *United States* v. *Krapp*, 815 F.2d 1183, 1187 (8th Cir.), cert. denied, 484 U.S. 860 (1987), nor *United States* v. *Whitaker*, 447 F.2d 314, 317 (D.C. Cir. 1971), supports petitioner's erroneous contention (Pet. 24) that "an oral request for lesser-included offense or other instructions is sufficient to * * * preserve[] the request for appellate review," a proposition that is at odds with Rule 30. In neither *Krapp* nor *Whitaker* did the court of appeals clearly reverse a district court's decision to reject an instructional request on procedural grounds; in each case, the district court appeared to have considered and rejected the request on the merits, and the government then apparently raised the procedural issue on appeal. See *Krapp*, 815 F.2d at 1187;

Whitaker, 447 F.2d at 317. Moreover, neither decision purports to abrogate a district court's discretion to reject proposed jury instructions that are filed in violation of Rule 30's procedural requirements. Indeed, after observing that "Rule 30 evidences a preference for written requests for instructions," the *Krapp* court reaffirmed that "[a] failure to make a written request can under certain circumstances be sufficient grounds for denial of the requests." 815 F.2d at 1187. One such circumstance is where, as here, the defendant's oral request provides insufficient notice of or support for the proposed instruction.[5]

3. Finally, petitioners challenge (Pet. 25-31) the district court's determination that Swissland had been defrauded by petitioners' scheme and that it had therefore suffered a "loss" for purposes of § 2F1.1 of the United States Sentencing Guidelines. Petitioners argue that Swissland could not have been defrauded because, in their view, Swissland must have known about petitioners' illegal scheme. The court of appeals rejected that argument in a footnote, holding that the district court's determination "that Swissland had been defrauded" was not "clearly erroneous." Pet. App. A20 n.3. That factbound determination warrants no further

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[5] The district court cited the untimeliness of petitioner's request as one of two independent reasons for denying that request. The court also explained that "the request does not contain a detailed statement" supporting the proposed lesser-included-offense instruction—a statement necessary to help the court determine whether such an instruction was in fact warranted and, if so, how it should be framed. C.A. App. 125; cf. Gov't C.A. Br. 42-44. That procedural default would impose an independent obstacle to appellate relief even if petitioners could plausibly argue that the district court abused its discretion in rejecting their request as untimely.

review. Although petitioners contend (Pet. 28, 30) that the court of appeals' holding on this point is "directly in conflict" with precedents (including Seventh Circuit precedents) concerning the appropriate burden of proof in attributing "losses" to defendants, that is plainly incorrect. The court of appeals did not discuss any issue concerning burden of proof, but simply reviewed the evidence of "loss" under a standard of review appropriately deferential to the district court.[6]

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[6] Petitioners contend (Pet. 29) that, in the court of appeals, the government "conceded * * * that it had not affirmatively proven that [Swissland] was defrauded by the defendants." That is inaccurate. The government argued instead: "[Petitioners] acknowledge that there was no direct evidence establishing actual participation or even guilty knowledge on Swissland's part, but apparently feel that the government must produce affirmative evidence to demonstrate the negative. * * * The government submits that it meets its overall burden of proof by demonstrating loss to a third party caused by [petitioners'] crimes, together with the absence of any evidence that the third party knew of the crime and accepted its benefits." Gov't C.A. Br. 55 (citation omitted). The court of appeals did not address the parties' dispute on that issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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